

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.6 Lesser-Included Offenses Under CSC Act

B. Applicable Statute and Three-Part Test

Insert the following text on page 110 before subsection (C):

In *People v Apgar*, ___ Mich App ___, ___ (2004), the Court of Appeals applied the three-part test outlined in *Cornell** and MCL 768.32 and determined that CSC III (victim between the ages of 13 and 16) is not a necessarily included lesser offense of CSC I. In *Apgar*, the defendant was charged with two counts of CSC I: one count was based on penetration by an offender who is armed with a weapon or an instrument that the victim reasonably believes is a weapon, MCL 750.520b(1)(e), and one count was based on penetration by an offender who is aided or abetted by one or more other persons, and where the offender uses force or coercion to accomplish the act of sexual penetration, MCL 750.520b(1)(d). After the jury had been selected, the prosecutor moved to amend the felony complaint to include a charge of CSC III, MCL 750.520d(1)(a) (victim between the ages of thirteen and sixteen). The trial court denied the motion. However, the trial court subsequently provided a jury instruction on CSC III, and the jury found the defendant guilty of CSC III.

On appeal, the defendant argued that the trial court erred by instructing the jury on CSC III because it is not a necessarily included lesser offense of CSC I, as charged in this case. The Court of Appeals stated:

“The jury convicted defendant of CSC III, sexual penetration of another person at least thirteen years of age and under the age of sixteen, MCL 750.520d(1)(a). Neither of the charged counts of CSC I includes the element of the victim’s age. Thus, it is possible to commit CSC I under MCL 750.520b(1)(d) or (1)(e) without committing the uncharged offense of CSC III, MCL 750.520d(1)(a). Accordingly, under *Cornell* CSC III, MCL

**People v Cornell*, 466 Mich 335 (2002).

750.520d(1)(a), is not a necessarily included lesser offense of CSC I, MCL 750.520b(1)(d) or (1)(e). Because both offenses require the act of sexual penetration and are of the same category of crimes, CSC III is a cognate lesser offense of CSC I as applied to this case.” *Apgar, supra* at ____.

Although the Court found CSC III is not a necessarily included lesser offense of CSC I, the Court affirmed the defendant’s conviction. The Court concluded that the defendant was not deprived of due process when the trial court instructed the jury on CSC III over defense counsel’s objection. According to the Court, “defendant was not deprived of due process because all of the elements of the uncharged crime [CSC III] were proved at the preliminary examination and trial without objection, providing defendant adequate notice.” *Apgar, supra* at ____.

Judge Murphy concurred in the majority’s conclusion that, as charged in this case, CSC III is a cognate lesser offense of CSC I but dissented from the majority’s affirmance of defendant’s conviction. Judge Murphy found no support in case law for “the position that a cognate lesser offense instruction may still be permissible or allowed to stand if due process rights are not offended and there exists evidence to support a finding of guilt for the cognate lesser offense.” *Apgar, supra* at ____ (Murphy, J, concurring in part and dissenting in part).